

1992

# Alan Gibson v. Utah Board of Pardons : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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ALAN GIBSON :  
Petitioner and Appellant : 920211-CA  
 :  
UTAH BOARD OF PARDONS : Argument priority 3  
Respondant and Appellee :  
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BRIEF OF PETITIONER/APPELLANT GIBSON  
-----

ON APPEAL FROM DISMISSAL OF A WRIT OF HABEAS CORPUS

THIRD DISTRICT COURT, SALT LAKE COUNTY

JUDGE KENNETH RIGTRUP  
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**FILED**  
Utah Court of Appeals

MAR 15 1993

  
Mary T. Noonan  
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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ALAN GIBSON	:	
Petitioner and Appellant	:	920211-CA
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BRIEF OF PETITIONER/APPELLANT GIBSON

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IN THE UTAH COURT OF APPEALS

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ALAN GIBSON :  
Petitioner and Appellant : APPELLANT'S BRIEF  
 :  
UTAH BOARD OF PARDONS : Appellate Court No.  
Respondent and Appellee : 920211-CA  
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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code 78-2a-3(2)(g). This appeal is from a final order that disposes of all claims with respect to all parties.

STATEMENT OF THE ISSUES

1. Did petitioner waive his Utah Constitutional rights by failing to specifically object to the ORDER OF DISMISSAL on Utah Constitutional grounds at the trial court?
2. Does the three-month statute of limitations contained in Utah Code § 78-12-31.1 violate petitioner's rights under the Utah Constitution Article I Sections 1, 5, 7, 11, and 26?
3. Was the trial court correct in dismissing petitioner's habeas corpus petition for hearing dates prior to April 27, 1987?

STANDARD OF REVIEW

These are issues of law requiring no deference to the trial court. This court reviews for correctness, "correctness of error" State v. Rhodes 818 P2d 1048, 1049 (Utah App. 1991), Smith v. Cook 803 P2d 788, 790 (Utah 1990) (no deference).

DETERMINATIVE LAW

Utah Constitution Article I Section 1,  
inherent and inalienable right to liberty

Utah Constitution Article I Section 5,  
the writ of habeas corpus shall not be suspended

Utah Constitution Article I Section 7,  
no deprivation of liberty without due process

Utah Constitution Article I Section 11,  
every person shall have a remedy by due course of law

Utah Constitution Article I Section 26,  
provisions are mandatory and prohibitory

Utah Code § 78-12-31.1: Within three months: For relief pursuant to a writ of habeas corpus. This limitation shall apply not only as to grounds known to petitioner but also to grounds which in the exercise of reasonable diligence should have been known by petitioner or counsel for petitioner.

Utah Code § 78-12-36, amended April 27, 1987,  
disability of incarceration

Garcia v. Jorgenson, 910298-CA, (unpublished memorandum decision May 18/92)

#### STATEMENT OF THE CASE

This appeal is from Third District Judge Kenneth Rigtrup's February 28, 1992 ORDER OF DISMISSAL, 91 090 6525 HC, wherein Gibson's PETITION SEEKING EXTRAORDINARY WRIT of Habeas Corpus was dismissed based on the 3-month statute of limitations in Utah Code §§ 78-12-31.1 and 78-12-36 as amended April 27, 1987.

#### STATEMENT OF THE FACTS

Petitioner Alan Gibson is prisoner 12937. Foote v. Board of Pardons 808 P2d 734 (Utah 1991) appeared Mar 14/91. Gibson filed a Pro Se PETITION FOR EXTRAORDINARY WRIT seven months later on Oct 16/91. Counsel for Gibson was appointed on Nov 25/91. An AMENDED PETITION was filed Jan 27/92 by appointed counsel. After a hearing on Feb 24/92, District Court Judge Kenneth Rigtrup issued an ORDER OF DISMISSAL on Feb 28/92 based on the three-month statute of limitations in Utah Code § 78-12-31.1. At the hearing

petitioner's counsel did not specifically object to the ORDER on Utah Constitutional grounds.

#### SUMMARY OF THE ARGUMENT

The three month statute of limitations in Utah Code § 78-12-31.1 violates petitioner's Utah Constitutional rights Article I Sections 1, 5, 7, 11, and 26; and this denial is so basic that it amounts to plain error. Further, the ORDER OF DISMISSAL was overly broad in sweeping away petitioner's rights to habeas corpus review of Parol Board hearings that occurred prior to April 27, 1987<sup>1</sup>.

#### DETAIL OF THE ARGUMENT

- 1 Did petitioner waive his Utah Constitutional rights by failing to specifically object to the ORDER OF DISMISSAL on Utah Constitutional grounds at the trial court?

In Garcia v. Jorgenson, 910298-CA, (unpublished memorandum decision May 18/92) Garcia argued the 3-month statute of limitations in Utah Code § 78-12-31.1 was unconstitutional. But, as in this case, Garcia had not raised the constitutionality of the Utah Code at the trial court below. This court affirmed the trial court's dismissal of Garcia's petition for habeas corpus saying "It is well-settled that this court does not review constitutional issues for the first time on appeal absent plain error or exceptional circumstances." Id at 4, citing State v. Archambeau, 880 P2d 920, 923-25 (Utah App. 1991). What is not

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<sup>1</sup> The date §§ 78-12-31.1 and 78-12-36 were amended to limit habeas corpus relief to 3-months from the time petitioner knew or should have known of grounds for relief.



clear from the Garcia decision is whether plain error or exceptional circumstances were in fact raised at the appeal court by Garcia.

Petitioner argues *infra* that the 3-month statute of limitations in Utah Code § 78-12-31.1 is unconstitutional under the Utah Constitution Article I Sections 1, 5, 7, 11, and 26, and that it is plain error for the trial court to dismiss Gibson's petition in violation of his constitutional rights.

Petitioner further argues that raising the constitutionality of the 3-month statute of limitations in § 78-12-31.1 at the trial court would not have been remedial since the trial court is obliged to follow the plain language of the statute. It is the statute itself that is wrong.

2 Does the three-month statute of limitations contained in Utah Code § 78-12-31.1 violate Utah Constitution Article I Sections 1, 5, 7, 11, and 26.

2a Utah Constitution Article I Section 1

All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; ... protest against wrongs, and petition for redress of grievances ...

Application of this section to a liberty interest may be an issue of first impression. Case law focuses on how property interests are protected the same as life/liberty interests, however, the analysis used by the court in reviewing a protected property interest is persuasive for analysis of a liberty interest protected in the same section.

In Block v. Schwartz 76 P. 22, 24-25 (Utah 1904) (fraudulent sale statute) the court said:

These constitutional provisions [Utah Constitution Article I Sections 1 and 7] constitute the supreme law of the commonwealth upon this subject. To that law the executive, the legislative, and the judicial departments of the government alike must bow obedience, as well as every subject. It forbids the abridgment by the state of the privileges and immunities of all citizens. Under its mandate no person can be deprived of life, liberty, or property without due process of law, and every person is entitled to the equal protection of the laws, and may acquire property, possess and protect it, as well as defend his life and liberty. These are inherent and inalienable rights of citizens, and are constitutional guaranties. An enactment, therefore, which deprives a person arbitrarily of his property, or of some part of his personal liberty, is just as much inhibited by the supreme law as one which would deprive him of life.

The court said in Ritholz v. City of Salt Lake, 284 P2d 702, 705 (Utah 1955) (anti-price advertising of eyeglasses statute) citing Backman v. Bateman 263 P2d 561, 563 (Utah 1953) (anti-nepotism statute) see also Pride Oil Company v. Salt Lake County 370 P2d 355, 356 (Utah 1962) (deceptive advertising):

In judging the propriety of this enactment, we must take into consideration the balance between the alleged evil sought to be corrected and the limitation on constitutional rights the ordinance would impose. In reference to the use of the police power for such a purpose, this Court has said: "There must exist an evil of a substantial nature, the correction of which would serve the public welfare \* \* \*."

In this case petitioner's liberty interest protected by Utah Constitution Article I Section 1 is being unduly compromised by the 3-month statute of limitations in § 78-12-31.1. Petitioner, from his prison cell, without aid of counsel or access to a law library, is expected to file suit to protect rights that arose from the Foote decision within 3-months or lose them forever. This is not just. This is not constitutional. Application of this limit here is especially heinous because the evil the state is protecting the "public" from is complaint of abuse by the state

itself. The state, by legislative fiat, is using a statute of limitations as a form of immunity to protect itself from the fallout of the Foote decision.

2b Utah Constitution Article I Section 5

The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it.

This writ cannot be abrogated or its efficiency curtailed by legislative action. Cases within the relief afforded by it cannot, until the people voluntarily surrender their right to this greatest of all writs by an amendment of the organic law, be placed beyond its reach and remedial action. The privilege of the writ cannot even be temporarily suspended, except for the safety of the state, except for rebellion or invasion.<sup>2</sup>

More recently Justice Stewart said in Hurst v. Cook 777 P2d 1029, 1033 (Utah 1989) (sexual abuse of a child):

Historically, the Writ has played such a large role in the history of our law that it has received specific constitutional protection. The Declaration of Rights of the Utah Constitution, Article I, section 5, expressly prohibits restrictions on the availability of the Writ except "when the public safety requires it.

Judges Garff, Billings and Davidson in Hatch v. Deland 790 P2d 49 (Utah App. 1990) (Per Curiam) found unconstitutional the state's attempt to immunize itself from the courts with Utah Code § 77-27-5(3) (decisions of the Board of Pardons are final and are not subject to judicial review). The court reversed the trial court saying "The right to petition for habeas corpus based on violation of substantial constitutional rights is guaranteed by Utah Constitution." Id at 50.

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<sup>2</sup> In re Dill 5 P. 39, 45 (Kansas 1884) quoting People v. Liscomb 60 N.Y. 559

Justice Zimmerman in Smith v. Cook 803 P2d 788, 796 (Utah 1990) (probation revoked after probationary period expired) (concurring opinion) speaking specifically to § 78-12-31.1 said "I do not think the legislature can validly impose a three-month limitation period on habeas corpus actions."

The language of article I, section 5 is clear, plain and unambiguous; it forbids suspension of the writ. When you add the weight of section 1 (inherent and inalienable rights) and section 26 (mandatory and prohibitory) to section 5 it is hard to see how any statute of limitation on habeas corpus could satisfy the Utah Constitution.

2c Utah Constitution Article I Section 7

No person shall be deprived of life, liberty or property, without due process of law.

This section empowers the court. In Condemarin v. University Hospital 775 P2d 348, 357 (Utah 1989) (statute imposing limits on amount person could claim against uninsured government entity) the court said:

We are required to assess the reasonableness of the legislative expansion of government immunity contained in section 63-30-10 against the degree of intrusion on rights protects by the Utah Constitution. That is the essence of the requirement of due process under our constitution. See Utah Const. art. I, § 7.

What is the 3-month statute of limitations in § 78-12-31.1 if not an expansion of government immunity? What is the state doing here except protecting itself from it's own bad acts? How can there be due process in so short a period of time?

2d Utah Constitution Article I Section 11

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have a remedy by due course of law ...

In Condemarin the court found provisions of the Utah Governmental Immunity Act, Utah Code §§ 63-30, unconstitutional under article I section 11. The court conducted a "means-end review" to insure that "legislative action be rationally related to the accomplishment of some legitimate state purpose." The court said a rationality requirement was "the most minimal of constitutional limitations on legislative action." Id at 356.

In Condemarin the court followed a two part test first articulated in Berry v. Beech Aircraft Corp. 717 P2d 670, 680 (Utah 1985) (statute of repose). First, does the law provide an effective and reasonable alternative remedy? Second, if not then abrogation must be justified by "clear social or economic evil" and may not be an "arbitrary or unreasonable means for achieving the objective." Condemarin at 357-58, see also Avis v. Board of Review 194 Utah Adv. Rep. 57, 58 (Utah App. 1992) (protection from stale claims is a legitimate legislative purpose for three year statute of limitation).

Since petitioner's rights are being cut off, no alternative state remedy is available (first prong) therefore under Berry there must be a clear social or economic evil (second prong). Here the only evil is that the state might have to defend against inmate claims. Even if avoiding the cost of defense is a legitimate state purpose, a 3-month statute of limitations is arbitrary and unreasonable (second prong part two). It is

unreasonable to expect prisoners to be able to coordinate the necessary resources to file a petition for writ of habeas corpus in so short a period of time.

2e Utah Constitution Article I Section 26

The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.

Similar to section 7, argued supra, this section empowers the court. In Berry at 676 the court said:

Article I, section 26 rivets section 11, and all the other rights in the Declaration of Rights, into the fundamental law of the State and makes them enforceable in a court of law. Article I, section 26 declares that "the provisions of this constitution are mandatory and prohibitory unless by express words they are declared to be otherwise."

3 **Was the court correct in dismissing petitioner's habeas corpus petition for hearing dates prior to April 27, 1987.**

In Garcia this court quoted the compiler's notes to Utah Code § 78-12-31.1 saying "the amendment to this section, deleting a reference to imprisonment as a disability, applies only to causes of action that arise after April 27, 1987 and has no retroactive application." Id at 4, (emphasis added).

Gibson had six Board hearings<sup>3</sup> prior to April 27, 1987. The trial court should not have dismissed Gibson's petition for those hearing dates. Gibson's right to petition for a writ of habeas corpus for those dates is protected by the pre-1987 Utah Code § 78-12-36 (disability of incarceration) since the 1987 amendment has no retroactive affect, Smith v. Cook 803 at 790.

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<sup>3</sup> Jan 28/87, Feb 13/85, Mar 31/82, Apr 23/80,  
Dec 18/74, Jul 16/73

CONCLUSION AND RELIEF SOUGHT

It was plain error for the trial court to dismiss Gibson's petition since the 3-month statute of limitations in Utah Code § 78-12-31.1 violates Gibson's Utah Constitutional rights by restricting his rights to habeas corpus relief.

Even if the trial court were correct in dismissing Gibson's petition for review of his Parol Board hearings occurring after April 27, 1987, the trial court was in error for dismissing Gibson's petition for review of his Parol Board hearings occurring before April 27, 1987 since the change in the law was not retroactive.

Gibson prays for release from confinement, for the trial court to hear his Petition for Writ of Habeas Corpus and for this court to rule that Utah Code § 78-21-31.1 is unconstitutional.

Mar 15/93 Mon

by Michael L. Adkins  
Michael L. Adkins, Esq  
for Petitioner/Appellant

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing  
BRIEF  
was delivered on Mar 15/93 Mon

to Lorenzo K. Miller, Esq  
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by Michael L. Adkins  
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APPENDIX

Garcia v. Jorgenson 910298-CA (Utah App. 1992)



FILED

MAY 18 1992

*Mary Noonan*

MAK. T. Noonan  
Clerk of the Court  
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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Lee Garcia, )  
 )  
Petitioner and Appellant, )  
 )  
v. )  
 )  
Lynn Jorgenson, Warden Young )  
Adult Correction Facility; )  
Gary W. Deland, Executive )  
Director, Utah State )  
Department of Corrections; )  
Gerald Cook, Director of )  
Institutional Operations, Utah )  
State Department of )  
Corrections; H.L. "Pete" Haun, )  
Chairman, Utah State Board of )  
Pardons; William Peters, )  
member, Utah State Board of )  
Pardons; Don Blanchard, )  
member, Utah State Board of )  
Pardons, )  
 )  
Respondents and Appellees. )

MEMORANDUM DECISION  
(Not For Publication)

Case No. 910298-CA

F I L E D  
(May 18, 1992)

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Third District, Salt Lake County  
The Honorable Kenneth Rigtrup

Attorneys: Jay Fitt, Orem, for Appellant  
R. Paul Van Dam and Lorenzo K. Miller, Salt Lake  
City, for Appellees

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Before Judges Orme, Bench and Billings.

PER CURIAM:

Petitioner appeals the trial court's dismissal of his complaint for post-conviction relief. We affirm.

On February 26, 1990, petitioner was convicted of theft and sentenced to serve one to fifteen years in the Utah State Prison. On February 26, 1990, the Utah Board of Pardons held a hearing to determine a possible parole date for petitioner. Only two board members were present and concluded plaintiff could receive a

tentative parole date of May 25, 1993. The three member board later issued an order, on December 4, 1990, granting appellant a parole date of January 25, 1994.

On March 20, 1991, petitioner filed a petition for post-conviction relief, claiming the board of pardons violated his rights of due process and equal protection. The State filed a motion to dismiss claiming, among other things, that the complaint was barred by the statute of limitations contained in Utah Code Ann. § 78-12-31.1 (1992). On April 26, 1991, the court granted the motion to dismiss on the basis that the claim was time barred by operation of section 78-12-31.1.

On appeal, petitioner claims the trial court erred in dismissing the complaint on the basis of the statute of limitations. First, he claims that section 78-12-31.1 does not apply because section 78-12-31.1 involves habeas corpus petitions and he filed a complaint for post-conviction relief. Rule 65B of the Utah Rules of Civil Procedure, as it existed in March of 1991 when the complaint was filed, provided that "[s]pecial forms of pleadings and of writs in habeas corpus, mandamus . . . and other extraordinary writs, as heretofore known, are hereby abolished."

Rule 65B(f) states that

[a]ppropriate relief by habeas corpus proceedings shall be granted whenever it appears to the proper court that any person is unjustly imprisoned or otherwise restrained of his liberty. If the person seeking relief is imprisoned in the penitentiary and asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United State or under the Constitution of the State of Utah, or both, then the person seeking such relief shall proceed in accordance with Rule 65B(i). In all other cases, proceedings under this subdivision shall be conducted in accordance with the following provisions . . . .

Rule 65B(i), entitled "postconviction hearings," provides that

any person imprisoned in the penitentiary . . . under a commitment of any court, whether such imprisonment be under the original commitment or under a commitment for violation of probation or parole, who asserts

that in any proceeding which resulted in his commitment there was a substantial denial of his rights under the Constitution of the United States or of the State of Utah, or both, may institute a proceeding under this rule.

(Emphasis added.)

Rule 65B(f) addresses all proceedings except claims regarding the proceedings resulting in the conviction. Rule 65B(i), on the other hand, appears to address claims involving original commitment or a commitment due to a violation of probation or parole. The present case involves a claim regarding petitioner's parole hearing. Because the claim does not involve the proceedings resulting in the conviction, we conclude that 65B(f) applies and the complaint constitutes a habeas corpus petition. We therefore reject petitioner's claim that section 78-12-31.1 does not apply because his pleading was not a petition for a writ of habeas corpus.

Petitioner also claims that even if section 78-12-31.1 applies, the statute of limitations was tolled during his period of incarceration pursuant to Smith v. Cook, 803 P.2d 788 (Utah 1990). In Smith, the Utah Supreme Court addressed the State's claim that the three month statute of limitations contained in section 78-12-31.1 should not be tolled by the disability of incarceration provision in Utah Code Ann. § 78-12-36 (1977). Section 78-12-36, before it was amended in 1987, provided that "[i]f a person entitled to bring an action . . . is at the time the cause of action accrued either . . . imprisoned on a criminal charge or in execution under the sentence of a criminal . . . the time of the disability is not part of the time limited for the commencement of an action." Appellant was imprisoned in 1984 and filed a petition for a writ of habeas corpus in 1988. In addressing appellee's claim that the disability of incarceration should not apply to habeas corpus actions, the court stated that appellee's claim was contrary to the clear language of section 78-12-36. The court further stated that "any ambiguity that may exist in sections 78-12-36 and 78-12-31.1 should be resolved in favor of the criminal defendant." Smith, 803 P.2d at 791. Therefore, the court held that the habeas corpus petition was not barred by section 78-12-31.1.

As noted in Smith, section 78-12-31.1 was amended in 1987 and now provides "[i]f a person entitled to bring an action, other than for the recovery of real property, is at the time the cause of action accrued, either under the age of majority or mentally incompetent and without a legal guardian, the time of the disability is not a part of the time limited for the

commencement of the action." Utah Code Ann. § 78-12-36 (1992). The compiler's notes to section 78-12-36 suggest "that the amendment to this section, deleting a reference to imprisonment as a disability, applies only to causes of action that arise after April 27, 1987 and has no retroactive application." Therefore, pursuant to Smith and in accordance with the compiler's notes, we conclude that those seeking habeas corpus relief must comply with the three month statute of limitations contained in section 78-12-31.1 unless their cause of action arose before April 27, 1987.

In this case, appellant's cause of action arose in 1990 when the board of pardons issued its order. Therefore, section 78-12-31.1 applies. Section 78-12-31.1 states: "[w]ithin three months: For relief pursuant to a writ of habeas corpus. This limitation shall apply not only as to grounds known to petitioner but also to grounds which in the exercise of reasonable diligence should have been known by petitioner or counsel for petitioner."

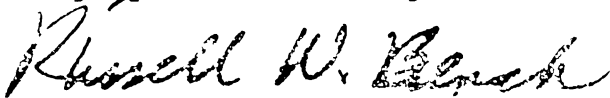
In this case, appellant complained of the board of pardons's December 4, 1990 order in his March 20, 1991 complaint for post conviction relief. Because the complaint was not filed within the three-month period, we find no error in the trial court's dismissal of the complaint on the basis that it was barred by section 78-12-31.1.

Finally, petitioner claims section 78-12-31.1 is unconstitutional. It is well-settled that this court does not review constitutional issues for the first time on appeal absent plain error or exceptional circumstances. State v. Archambeau, 880 P.2d 920, 923-25 (Utah App. 1991). The record contains no indication that petitioner raised the constitutionality of the statute below. We therefore decline to address the issue for the first time on appeal.

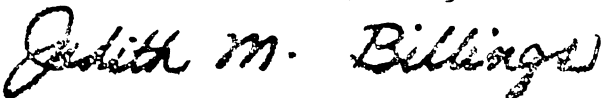
We affirm the trial court's dismissal of the petition for a writ of habeas corpus on the basis that it was barred by the statute of limitations contained in section 78-12-31.1.



Gregory K. Orme, Judge



Russell W. Bench, Judge



Judith M. Billings, Judge